UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

SAINT JOHN'S HEALTH CENTER

and

Cases 31-CA-29005 31-CA-29315

CALIFORNIA NURSES' ASSOCIATION/ NATIONAL NURSES ORGANIZING COMMITTEE

Katherine Mankin, Esq. of Los Angeles, California, on behalf of the General Counsel.

Marcie Berman, Esq., Los Angeles, California, on behalf of the Charging Party.

Robert Kane, Esq. (Stradling Yocca Carlson & Rauth) Newport Beach, California, on behalf of Respondent.

DECISION

Statement of the Case

John J. McCarrick, Administrative Law Judge. This case was tried in Los Angeles, California on March 8 and 9, 2010, upon the Order Consolidating Cases and Consolidated Complaint (Complaint), issued on November 30, 2009, by the Regional Director for Region 31.

The complaint alleges that Saint John's Health Center (Respondent) violated Section 8(a)(1) of the Act by interrogating employees about their union activities, by prohibiting employees from wearing ribbons reading "St. John's RNs for Safe Patient Care" in immediate patient care areas, by threatening employees with discipline for wearing the ribbons, by promulgating and maintaining a rule limiting off duty employee access to discourage employees' from engaging in protected activities, by selectively and discriminatorily enforcing the access rule to discourage employees from engaging in protected activities, by creating the impression that employees protected activities were under surveillance and by threatening employees with arrest because employees engaged in protected activities. In its answer, as amended, Respondent admitted many of the operative allegations of the Complaint but denied it had violated the Act.

Findings of Fact

Upon the entire record herein¹, including the briefs from the General Counsel,² Charging Party and Respondent, I make the following findings of fact.

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I. Jurisdiction

Respondent admitted it is a California corporation with an office and place of business located in Santa Monica, California, where it is engaged in the operation of an acute care hospital. Annually, Respondent in the course of its business operations derived gross revenues in excess of \$250,000 and purchased and received at its facility goods valued in excess of \$50,000 in directly from points outside the State of California.

Based upon the above, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

Respondent admitted and I find that the California Nurses Association/ National Nurses
Organizing Committee (Union) is a labor organization within the meaning of Section 2(5) of the
Act.

III. The Alleged Unfair Labor Practices

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A. The Facts

1. Background

This case involves an organizing campaign that was conducted by the Union at Respondent's facility among its RNs in 2008, Respondent's enforcement of a no access rule, Respondent's enforcement of a rule prohibiting wearing paraphernalia in patient care areas, and Respondent's threats to have employees arrested for violating its no access rules. Respondent contends, inter alia, that wearing the ribbon was disparaging to Respondent.

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By May, 2008, a petition³ to certify the Union as the representative of Respondent's Registered Nurses (RNs) was being circulated among Respondent's employees. Approximately 235 to 240 RNs signed the petition. RN Lori Hammond (Hammond), RN Zhila Morrissi (Morrissi), RN Jack Cline (Cline), and RN Lizabeth Wade (Wade) were among the nurses who helped circulate the petition and deliver the petition to the CEO of the hospital, Lou Lazatin (Lazatin). The petition was presented to Respondent on or about October 1, 2008. The petition included a cover letter⁴ and included the following statement:

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¹ On September 30, 2009, Counsel for the General Counsel filed a Motion to Correct the Record. Good cause having been shown and no opposition filed, the Motion is granted.

² On October 14, 2009, Counsel for the General Counsel filed and Errata to Post Hearing Brief. As the Errata corrects a clerical error and there is no opposition, I accept the Errata.

³ GC Exh. 2.

⁴ R. Exh. 6.

Enclosed are Saint John's RNs' signatures on a petition calling for *compliance with California safe staffing laws and regulations*, for fair compensation that will enable our hospital to attract and retain quality registered nurses, and for ending all expenditures on anti-union consultants.

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2. The Alleged Interrogations

a. Interrogations by Trudi Hemmons

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Approximately the second week of October 2008, Nurse Manager Trudi Hemmons (Hemmons), an admitted 2(11) supervisor, discussed the petition with 5 to 6 RNs in her Unit. The discussions took place at a nursing station in the Medical Surgery Unit during a change in shift. As the RNs were sitting at the nursing station, Hemmons went from person to person, addressing 1 to 2 RNs at a time. Hemmons asked all the RNs why they had signed the Petition. None of the RNs responded except for RN Cline. During the discussions, Hemmons said, "we don't need a third party representation at Saint John's."⁵ and continued to refer to the Union as a third party. RN Cline responded to Hemmons by stating that "the union wasn't a third party [and] that the nurses at Saint John's would make up the union."⁶ The RNs' testimony was credible and uncontroverted. I will credit their testimony.

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2. Interrogations by Janice Frost

Between approximately October 7, 2008 and October 15, 2008, Janice Frost (Frost)

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Respondent's Interim Director of In-Patient Oncology initiated conversations about the petition with RN Morrissi, RN Ann Chan (Chan), RN Colleen O'Grady (O'Grady), RN Lynn Larson (Larson), RN Steven Weisbaum (Weisbaum), and RN Sunny SunSheil Choy (Choy). The parties stipulated that Frost was a supervisor of Respondent within the meaning of Section 2(11) and/or an agent of Respondent within the meaning of Section 2(13).⁷ Each of the conversations, besides RN Choy's, took place at the nurses' station in the Oncology Unit. The conversation with RN Choy took place in Frost's office. During the conversations, Frost asked the RNs questions about the their signatures on the petition, including whether they knew that the petition would be presented to Respondent's administration and why they thought Respondent's nurses needed a union. Frost did not assure the RN's that their participation was voluntary or that there would be no repercussions or reprisals.

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With regard to Frost's November 2008 conversations about the petition with RNs Morrissi and Chan, the following also occurred: Frost told both of them that some nurses felt pressure to sign the petition. Morrissi asked Frost, "What do you mean they felt pressure?" Frost indicated that the nurses did not know what they had signed. Morrissi responded, "I didn't put [a] gun to anyone's head to sign this paper. I asked them to read it carefully." Frost then approached RN Chan and said "Ann, do you know why you signed the paper?" Chan appeared angry and responded, "What?" Chan then told Janice that she didn't sign the petition. At this point, Frost started looking through the petition to find Chan's name. Morrissi indicated that Chan did not sign the petition and that she did not even bother approaching Chan because she knew she was anti-union. Chan again stated she did not sign the petition.⁸ At the time of the conversations, no unfair labor practices had been filed by the Union against Respondent. At

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⁷ GC Exh. 3.

⁵ Transcript at pages 199, 201.

⁶ Ibid.

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⁸ Transcript at pages 103-106.

the time of the conversations, Frost was not seeking to verify a union's claimed majority status or to investigate facts related to issues raised in a complaint. I credit the RNs' unrebutted testimony.

5 3. The Ribbon

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In early November 2008, Union organizers gave RNs at Respondent a white ribbon, stating "Saint John's RNs for Safe Patient Care" (ribbon).⁹ The ribbon was distributed to other RNs employed by Respondent. For approximately two weeks, RNs wore the ribbon throughout Respondent's facilities, including patients' rooms. The ribbons were worn as an expression of Union solidarity, as well as a concern about Respondent's non-compliance with a staffing law dealing with nurse-patient ratios.

The RNs' uncontradicted and credited testimony indicated that neither patients nor persons visiting patients commented or asked questions about the ribbon. The RNs' unrebutted testimony established also that none of their supervisors or managers asked them about whether patients and persons visiting patients had commented or asked about the ribbon.

On November 7, 2008, Respondent's Vice President of Human Resources Steven Sharrer (Sharrer), an admitted 2(11) supervisor, e-mailed¹⁰ Respondent's supervisors and told them that employees could not wear the ribbon in "immediate patient care areas." In his e-mail, Sharrer defined "immediate patient care areas" as "patient rooms, treatment rooms, surgery, etc." Sharrer indicated that employees could, however, wear the ribbon in, "the hallways, break rooms or other areas that are not immediate patient care areas." Sharrer explained that the rational for prohibiting the ribbon in immediate patient care areas was that it was "detrimental and disruptive to patient care." Sharrer testified that the only investigation Respondent undertook was to determine what departments the ribbon was being worn in. According to Sharrer, he assumed that if a nurse was wearing the ribbon in the department, they would wear it wherever they went.¹¹

On approximately November 20 or November 21, 2008, Respondent's Director of Women's Health Services Irena Zuanic (Zuanic), an admitted 2(11) supervisor, spoke with RN Hammond, RN Melinda Bishop (Bishop), RN Martina Munoz-Friedman (Munoz-Friedman), and RN Christina Craig (Craig) in the conference room of the Labor and Delivery Unit. During the discussion, Zuanic instructed the RNs that they were not to wear the ribbon in immediate patient care areas and that if they continued to wear the ribbon they would be written up for insubordination.

The RNs have worn a variety of other insignias on their uniforms in immediate patient care areas from 2008 to 2010. Organ donor badges, cancer awareness bracelets, diabetes and cancer ribbons, political buttons supporting Obama, religious symbols and badges, and St. John's issued buttons that said "Saint John's mission is patient safe care" and "Just Ask," were among the insignias worn at Respondent's facilities. Union insignias were also worn in immediate patient care areas, including CNA badge lanyards and CNA buttons that said "Respect and Dignity" and "Saint John's Nurses –the Heart of Healthcare." Respondent took no action against RN's for wearing buttons or insignias except for the ribbon at issue.

⁹ GC Exh. 6.

¹⁰ GC Exh. 7.

¹¹ At the time he issued the email. Sharrer incorrectly thought the ribbon said: "Saint John's RNs for Safer Patient Care."

4. Off-Duty Access and Surveillance

a. Written Policies Regarding Off-Duty Access

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Respondent had a policy, effective June 2003 that dealt with solicitation and distribution (the old policy). 12 The old policy did not address employee off-duty access.

Respondent also maintained a handbook which was distributed until approximately August 2005 (handbook). 13 The handbook was never rescinded. The handbook states the 10 following:

The access of employees to the interior of Saint John's premises and to working areas of the exterior of the premises while not on duty shall be permitted only for the purpose of visiting a patient. 15

Up until August 2005, handbooks were handed out to employees and signed by employees during the new hire process. RNs Wade and Cline signed employee acknowledgement forms¹⁴, indicating receipt of the handbook. Sharrer was unaware of the existence of the handbook and any written rule with respect to off-duty access until January 2010, when he complied with the subpoena in this matter. Before January 2010, Mr. Sharrer believed that Respondent's off-duty access rule was a matter of practice.

Respondent's current Solicitation and Distribution Policy 830.08 (current policy) became effective January 1, 2009. The currrent policy states the following:

Off-duty employees are not allowed access to the interior of the Health Center's buildings or to other working areas at the Health Center. Off-duty employees are permitted access to the cafeteria and are also permitted access to the building to attend Health center sponsored events, such as retirement parties and baby showers. Employees are expected to arrive at their work area at or shortly before the beginning of their scheduled shift, and are expected to leave their work area promptly after completing their shift.

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Sharrer said that the current policy was revised in January 2009 to reflect what Respondent's practices were at that time. In determining Respondent's practices regarding offduty access, Sharrer consulted the nursing director and various clinical directors. The policy was eventually posted on Respondent's shared intranet and could be first accessed by employees at some point in May 2009.

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In March 2009, Sharrer spoke with Kevin Litzenberger, Respondent's Security supervisor and told him that off duty employees should not be in the hospital.

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¹² GC Exh. 9.

¹³ GC Exh. 10, page 42.

⁵⁰ ¹⁴ R. Exhs. 3 and 4.

¹⁵ GC Exh. 8.

b. History and Workplace Culture Regarding Off-Duty Access

The evidence disclosed that RNs have gone to the interior of the hospital while off-duty many times throughout their employment at Saint John's. Some of the off duty visits included collecting personal belongings, picking up items ordered from other nurses and staff, checking the schedule, requesting vacation, attending baby showers and birthday parties, attending personal or family Dr. appointments and procedures, and simply visiting with friends and coworkers. The RNs often would come into the hospital while off-duty and end up working a shift. Charge nurses, supervisors, and managers observed RNs on numerous occasions in the hospital while off-duty and RNs were never told that they couldn't be in the hospital until after May, 15, 2009.

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c. May 14, 2009 Incident¹⁶

At approximately 9:30 p.m. on May 14, 2009, RNs Wade and Cline went to the nurses' lounge in the Post-Coronary Care Unit to talk with other nurses about CNA and distribute CNA literature. The nurses' lounge is considered a non-working area. Wade was off-duty and was wearing street clothes and her hospital badge.¹⁷ Cline was also off-duty but still had on his uniform, as well as his hospital badge.¹⁸ After approximately 20 minutes, Charge Nurse "Louis" came in and asked Wade and Cline what they were doing. Wade and Cline introduced themselves, identified themselves as being from Labor and Delivery, and explained that they were campaigning for CNA.

At approximately 10:00 p.m. on May 14, 2009, house supervisor, Ann DeBello (DeBello) called Sharrer and told him that two "union organizers" were speaking to staff in the employee lounge. Sharrer claimed he was under the assumption that the union organizers were non-employees and that it was not until after the incident that he learned that the Union organizers were employees. Sharrer instructed the house supervisor to tell security to go to the lounge and tell the union organizers to leave. Sharrer also instructed the house supervisor to tell security that if the individuals refused to leave, security should call the police.

A few minutes later, two security guards responded to the incident. Standing outside of the doorway to the nurses' lounge, security guard "Bert" asked RNs Wade and Cline what they were doing. Wade and Cline identified themselves as hospital nurses and explained that they were campaigning for CNA, that they were allowed to be there, and that they weren't disrupting patient care. Another nurse who was present in the lounge got up and shut the door on the security guards. After a few minutes, the door was opened and security guard "Bert" insisted that they leave the premises. Wade and Cline then left the nurses' lounge. As they were passing the nurses' station, Wade told the security guards that what the guards were doing was wrong and that it was harassment and intimidation. Security guard "Bert" instructed her that she

¹⁶ Wade and Cline's testimony was not contradicted. Their testimony was detailed, consistent and credible. I will credit their testimony.

¹⁷ RN Wade testified that her current hospital badge has a CNA lanyard attached to it and that she has been wearing it for approximately 1 year prior to the hearing –i.e. prior to May 14, 2009. However, after being shown her Board affidavit, RN Wade admitted that she may have received the CNA lanyard after May 14, 2009. This minor discrepancy does not otherwise affect Wade's credibility.

¹⁸ While RN Cline testified that his current hospital badge has a CNA lanyard attached to it, he indicated that he has only been wearing the CNA lanyard for approximately 6 months –i.e. post May 14, 2009.

could be arrested by the police and charged with trespassing if they did not comply. Wade and Cline then left the immediate area and there was no disruption in the care of the Unit. The security guards then followed Wade and Cline to the elevators.

d. May 15, 2009 Incident

At approximately 9:00 a.m. on May 15, 2009, RN Cline went to the hospital with Eric Schmidt (Schmidt) to retrieve Cline's wallet. Cline was off-duty and was wearing street clothes and his hospital badge. Schmidt was not an employee and was wearing street clothes. As Cline was walking through the south entrance of Saint John's, a security guard¹⁹ yelled, "Stop, Jack." The guard also told him, "No union business." Cline responded, "I'm here to get my wallet. I have no intention o[f] doing union business." The guard insisted that he stop. Cline explained that he was an employee and that he could proceed. The security guard yelled to another security guard and told the guard, "Follow Jack up there." At this point, Cline and his friend went to the Medical/Surgical Unit to retrieve Cline's wallet from the break room. During this period, the security guard followed Cline throughout the hospital. As Cline passed the nurses' station, he told the guard, "I'm a Saint John's employee. You shouldn't be following us around the hospital." Cline and Schmidt then left the hospital facilities.

e. Post-May 15, 2009 Notifications²³

Employees were not notified about the existence of an updated policy regarding off-duty access until after May 15, 2009. Sometime in the last 2 weeks of May 2009, Manager Zuanic held an impromptu staff meeting at the nurses' station in the Labor and Delivery Unit. RNs Hammond, Wade, Christafuli, and Chavez were present at the meeting. At the meeting, Zuanic said she wanted to discuss a policy regarding off-duty access to the hospital and indicated that the policy had been in effect since January 2009. Zuanic told the RNs that they were forbidden to come into the Unit while off-duty and explained that they were only allowed in the hospital six minutes before a shift and six minutes after a shift. Zuanic told the RNs that there were limited situations when they could still come into the Unit while off-duty including staff meetings, a new baby, or to bring a cake for an occasion. Zuanic showed Hammond and Wade a copy of the

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¹⁹ RN Cline testified that he thought the security guard's name was "Lee." It is somewhat unclear, however, whether the security guard Cline thought he saw was in fact security guard "Lee King," or was another security guard named "Hobson." Cline described "Lee" as an African American with a goatee. He also described him as a "little overweight." Sharrer testified that there was a security guard at Saint John's named "Lee King." Sharrer described "Lee King" as an "African American, probably 5'8" to 5'10", slightly overweight, meaning he has a pot belly." Sharrer also noted that Lee King had been known to have a goatee. However, Sharrer indicated that "Lee King" was not scheduled to work on May 15, 2009. Sharrer testified that "Hobson" was the only African American security guard scheduled to work on May 15, 2009. Sharrer described Hobson as an African American, 5'8" to 5'10", who had a goatee at times, but was "not slightly overweight." I do not find this discrepancy to affect Clines' otherwise uncontroverted and credible testimony. The Respondent's ADR Report for May 15, 2009 does not reflect the incident with Cline and Schmidt. GC Exh. 13. However, I find those reports unreliable since they do not reflect whether the hours reported refer to May 14 or May 15, 2009.

²⁰ Transcript at page 216.

²¹ Ibid.

²² Transcript at page 218.

²³ The RNs' testimony concerning this was not contradicted or rebutted. Their testimony was detailed and given in an honest and forthright manner. I will credit their testimony.

policy dated January 2009. Zuanic also indicated that the policy could be found on the intranet.²⁴ Following the meeting, the policy was posted in the team room and in the break room in the Unit. Hammond and Wade testified that they had never seen the policy before. Hammond said that the RNs were concerned about this sudden change in policy and cited examples to Zuanic when they had previously came into the hospital while off-duty and that they were never told that they couldn't be in the Unit. Zuanic responded by stating that the policy had always been in place and that it was the employees' responsibility to know Respondent's policies and procedures.

Approximately May 21, 2009, RN Cline received an e-mail from Respondent regarding Respondent's solicitation and distribution policy. Prior to this e-mail, Cline had not received any other e-mails concerning Respondent's policies.

B. The Analysis

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1. The Hemmonds' Interrogation

In Complaint paragraph 6 it is alleged that in late September 2008²⁵, Hemmonds interrogated employees about their support for the Union and about a petition relating to the Union or wages, hours or working conditions.

In Westwood Healthcare Center, 330 NLRB 935 (2000) the Board discussed the test to determine whether interrogation is unlawful under Section 8(a)(1) of the Act. In Westwood the Board applied the totality of the circumstances test adopted in Rossmore House, 269 NLRB 1176 (1984). The Board said it would look at five factors to determine whether the questioning of an employee constitutes an unlawful interrogation:

- (1) The background, i.e. is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
 - (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
 - (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
 - (5) Truthfulness of the reply.26

40 The Board added:

²⁴ The intranet can be accessed at a computer terminal at Respondent's facilities. RN Hammond indicated that she cannot access the intranet from her home. Hammond also indicated that while it is possible to access the intranet while on-duty, it is difficult due to patient assignments.

²⁵ While the Complaint alleges that the Hemmonds' interrogation took place in September 2008, the record reflects the interrogations occurred in October 2008. Since the matter was fully litigated, I will consider the conduct which occurred in October 2008 as supporting the allegations contained in Complaint paragraph 6. *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995).

²⁶ Westwood at page 939.

In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.²⁷

In this case there is evidence through its letter to employees²⁸ that Respondent was opposed to its employees' organizing activities. Hemmond's interrogations must be measured in this context. Hemmonds was a high level supervisor in charge of two departments. The information solicited by Hemmonds went directly to the heart of identifying and discouraging employees' protected-concerted activity. Hemmonds demonstrated Respondent's hostility toward the Union and she interrogated the RNs one by one. Most did not venture a reply.

I find that Hemmond's interrogation was calculated to coerce employees so that they would feel restrained from engaging in Section 7 activities. In view of the Frost interrogations discussed below, this was not an isolated incident. I conclude that Respondent violated Section 8(a)(1) of the Act as alleged in Complaint paragraph 6.

2. The Frost Interrogation

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Complaint paragraph 7 alleges that on about October 7, 2008²⁹ Frost interrogated employees about their support for a petition relating to the Union or wages, hours or working conditions.

The evidence reflects that Frost, Respondent's Interim Director of In-Patient Oncology, a high level supervisor, interrogated at least 6 RNs about their participation in a Union petition. As noted above, this interrogation occurred in the context of anti Union statements by Respondent's high level managers and supervisors. The effect of such interrogations about fundamental employee union and protected-concerted activity could have no purpose other than to discourage those activities particularly in view of the fact that Frost did not assure the RN's that their participation was voluntary or that there would be no repercussions or reprisals for their participation and in view of the fact that no unfair labor practices or election petition had been filed which might have justified some investigation into the Union's majority status or into the basis of unfair labor practice charges. I conclude that Frost's interrogation of employees

violated Section 8(a)(1) of the Act as alleged in complaint paragraph 7.

3. The Policy Prohibiting Employees from Wearing Ribbonsin Immediate Patient Care Areas.

Complaint paragraph 8 alleges that since about November 7, 2008 Respondent has prohibited employees from wearing ribbons stating "Saint John's RNs for Safe Patient Care" in immediate patient care areas.

²⁷ *Id.* at page 940.

^{45 28} GC Exhs. 15 and 16.

²⁹ The evidence adduced at the hearing reflects that Frost engaged in similar interrogations of several employees on dates between October 7, 2008 and November 2008. Since the matter was fully litigated, I will consider the conduct which occurred in October and November 2008 as supporting the allegations contained in Complaint paragraph 7. *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995).

Counsel for the General Counsel contends that Respondent's prohibition on wearing the ribbons in immediate patient care areas is not valid since the evidence demonstrates that the ribbons had no adverse effect on patients or health care operations. To the contrary, Respondent argues that its ribbon policy is presumptively valid.

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After Congress passed the 1974 Health Care Act granting the Board jurisdiction over hospitals, the Board adopted a dual standard for employee solicitation in hospital facilities in *St. John's Hospital and School of Nursing, Inc.,* 222 NLRB 1150 (1976). The Supreme Court cited *St. John's Hospital* with approval in *NLRB v. Beth Israel Hospital,* 437 U.S. 483 (1978). The Board's dual test, as approved by the Supreme Court, permits a hospital to prohibit solicitation in non work time in immediate patient care areas. However, such prohibitions in areas other than immediate patient care areas are invalid absent a showing of disruption to patient care or health care operations if solicitation were permitted in those areas. In *NLRB v. Baptist Hospital, Inc.,* 442 U.S. 773 (1979), the Supreme court concluded that the hospital had established special circumstances that validated the applicability of its no solicitation rule to areas outside immediate patient care areas including patient ward corridors and waiting areas but not to other areas of the hospital.

In subsequent cases the Board has had occasion to review hospital no solicitation rules that prohibited employee solicitation in areas other than immediate patient care areas. In *George J. London Memorial Hospital*, 238 NLRB 704, 708 (1978), the Board affirmed it does not prohibit rules forbidding organizational activity in operating rooms, patients' rooms, and patients' lounges but a rule proscribing solicitation in all areas is improperly overbroad. The Board again restated this principle in *Casa San Miguel*, 320 NLRB 534, 540 (1995), where the

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Board stated:

[E]mployees have the right to wear union insignia even while at work. A hospital's prohibition of the wearing of insignia, however, on working and even on nonworking time in immediate patient care areas is presumptively valid. Outside immediate patient care areas, and outside other areas where the hospital establishes an adverse effect on patient care, employees retain the right to wear union insignia while working. An employer may further restrict the right by demonstrating "special circumstances."

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In *Mt. Clemens General Hospital*, 335 NLRB 48, 50 (2001), the Board adopted the rationale of the ALJ who found that the hospital's requirement that employees remove union insignia from their uniforms in all areas of the hospital was overbroad. While recognizing the general rule that, "Respondent's prohibition of wearing the FOT button in hospital patient care areas, under Board precedent, such a position is normally presumptively valid," the administrative law judge concluded that the rule was invalid because:

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First, the Respondent did not prohibit the wearing of any other insignia or union buttons in all areas of the hospital including patient care areas. . . . Second, while Respondent Vice President of Medical Affairs Dr. Michael Tonie testified that the wearing of the FOT button in patient care areas of the hospital could cause possible disruptions, he never put his reasons for such speculation in writing. Likewise, he did not know of any complaints from patients or their families that the wearing of the FOT button was disruptive or caused a dialogue to take place with the RN's. Moreover, Dr. Tonie admitted that no hospital administrator made an official report that the wearing of the FOT button caused any disruption or interfered with patient care or safety. . . . Third, Horde admitted that the wearing of the FOT button did not cause a work stoppage or sit-down strike and she did not have any evidence that the RN's discussed the FOT button with patients. Likewise, she acknowledged that the Respondent did not conduct a survey

or make any inquiries of patients or their families that the wearing of the FOT button interfered with patient care or safety.

Recently in *Sacred Heart Medical Center*, 347 NLRB 531, 531-532 (2006) *rev. and remanded* 526 F. 3d 577 (9th Cir. 2008), the Board restated its hospital solicitation rules in a case where the hospital prohibited the wearing of a union button reading "RNs Demand Safe Staffing" in those parts of the hospital where employees might encounter patients or their families. The Board stated once again:

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In healthcare facilities, restrictions on the wearing of union-related buttons are presumptively valid in immediate patient care areas. *Casa San Miquel*, 320 NLRB 534, 540 (1995). Outside immediate patient care areas, such restrictions are presumptively invalid. Id. An employer may rebut the presumption of invalidity, however, by showing "special circumstances," i.e., that the restriction is "necessary to avoid disruption of health care operations or disturbance of patients." *Beth Israel Hospital v.NLRB*, 437 U.S. 483, 507 (1978).

In Sacred Heart Medical Center the Board concluded that the rule was valid since, "Respondent has rebutted the presumption of invalidity by showing "special circumstances" that justify the restriction." The Circuit Court reversed the Board and concluded that the evidence did not establish special circumstances sufficient to overcome the presumption of invalidity of the rule outside immediate patient care areas.

In the instant case there is no dispute that Respondent's rule prohibited RNs from wearing the "Saint John's RNs for Safe Patient Care" ribbon only in immediate patient care areas that included patient rooms, treatment rooms, and surgery but they were permitted to be worn in the hallways, break rooms or other areas that are not immediate patient care areas. Here Counsel for the General Counsel argues that the Board's "special circumstances" test should apply to rebut the presumption of the validity of no solicitation rules limited to immediate patient care areas. Contrary to General Counsel's assertion in its brief, nothing in Sacred Heart Medical Center, suggests that the "special circumstances" test may be applied to rebut the validity of rules limited to immediate patient care areas. The Board in Sacred Heart Medical Center limited its finding to a no solicitation rule that applied outside immediate patient care areas and was thus subject to a rebuttable presumption. While the Board in Mt. Clemens General Hospital, supra, seems to have adopted the Administrative law judge's rationale that the "special circumstances" rule applied to immediate patient care areas, this finding was dicta, since the issue before the ALJ was whether the rule was invalid because it applied beyond immediate patient care areas. I conclude that the rule prohibiting RNs from wearing the "Saint John's RNs for Safe Patient Care" ribbon only in immediate patient care areas was presumptively valid. Moreover, the absence of complaints from patients or their families about the ribbons or the lack of inquiry by Respondent into whether the ribbons disturbed patients or their families is insufficient to overcome the presumption of the rule's validity. Sacred Heart Medical Center, 347 NLRB 531, 531-532 (2006) rev. and remanded 526 F. 3d 577 (9th Cir. 2008). I will dismiss this allegation.

There is no allegation in the Complaint that the ribbon rule was disparately enforced. However at the hearing, contrary to Respondent's assertion that there is no evidence of disparate enforcement, Counsel for the General Counsel adduced evidence, including evidence from Respondent's Vice President for Human Resources Sharrer, that Respondent permitted RNs to wear a wide variety of ribbons and other insignia in immediate patient care areas of the hospital without restriction. I find the issue of disparate enforcement of the ribbon rule was both

fully litigated and is closely related to an extant Complaint allegation. *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995).

The record is replete with instances in which Respondent has permitted its RNs to wear insignia in immediate patient care areas from 2008-2010 including organ donor badges, cancer awareness bracelets, diabetes and cancer ribbons, political buttons supporting Obama, religious symbols and badges, and St. John's issued buttons that said "Saint John's mission is patient safe care" and "Just Ask." Union insignias were also worn in immediate patient care areas, including CNA badge lanyards and CNA buttons that said "Respect and Dignity" and "Saint John's Nurses –the Heart of Healthcare."

In *The Guard Publishing Company d/b/a The Register-Guard*, 351 NLRB 1110 (2007) a majority of chairman Battista and members Kirsanow and Schaumber with members Liebman and Walsh dissenting reversed a long line of Board cases dealing with discriminatory enforcement of work rules. Citing two 7th Circuit decisions³⁰ the Board adopted a new standard for determining if an employer's discriminatory enforcement of work rules violates Section 8(a)(1) of the Act. The Board held it would no longer be sufficient to show that an employer merely disparately enforced its rules but it must be shown that,

... unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status, and we shall apply this view in the present case and in future cases."31

In an attempt to define what constitutes similar activities the Board elaborated:

For example, an employer clearly would violate the Act if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees. In either case, the employer has drawn a line between permitted and prohibited activities on Section 7 grounds. However, nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non business-related use.

Even under a *Register-Guard* analysis of the ribbon policy, Respondent has engaged in disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status. Thus, Respondent has permitted RNs to wear St. John's issued buttons that said "Saint John's mission is patient safe care" and CNA badge lanyards and CNA buttons that said "Respect and Dignity" and "Saint John's Nurses –the Heart of Healthcare." Clearly, the ribbon represented a working condition, staffing ratios, that RNs made part of their organizing campaign. Respondent's promulgation of the ribbon rule was motivated by RN's protected concerted activity and was discriminatory application of a no solicitation rule in violation of Section 8(a)(1) of the Act.

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³⁰ 349 F.3d 968 (7th Cir. 2003) and 49 F.3d 317 (7th Cir. 1995).

³¹ 351 NLRB at page 1118.

³² Id. at page 1118.

4. The Enforcement of the Rule Regarding the Wearing of Ribbons

Complaint paragraph 9 alleges that on about November 14, 2008, Zuanic threatened employees with discipline if they wore ribbons in immediate patient care areas.

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Having concluded that the Respondent has applied the ribbon rule in a disparate fashion in violation of Section 8(a)(1) of the Act, it follows that Zuanic's November 20, 2008 threat to enforce the rule also violates Section 8(a)(1) of the Act as alleged in paragraph 9 of the Complaint.

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5. The Promulgation of New Access Rules

Complaint paragraphs 10(a) and (b) allege that in about March 2009 Respondent promulgated and maintained a rule limiting access of off duty employees to the hospital to discourage its employees from engaging in protected-concerted activity.

Counsel for the General Counsel contends that *Tri-County Medical Center, Inc.*, 222 NLRB 1089 (1976), controls this case and that Respondent enforced its access policy in a discriminatory fashion. Respondent contends that its access policy meets the *Tri County* test. Respondent also takes the position that there is no disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status under *Register-Guard*.

In *Tri County* the Board held that a rule denying off-duty employees access to the employer's premises is valid only if:

... it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

In this case Respondent maintained a handbook that states the following:

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The access of employees to the interior of Saint John's premises and to working areas of the exterior of the premises while not on duty shall be permitted only for the purpose of visiting a patient.

Respondent had a policy, effective June 2003 that dealt with solicitation and distribution (the old policy). However, the old policy did not address employee off-duty access.

Respondent's current Solicitation and Distribution Policy 830.08 became effective January 1, 2009. The current policy limits off-duty employees access to the interior of the Health Center's buildings or to other working areas at the Health Center but allows access to the cafeteria and access to the building to attend Health Center sponsored events, such as retirement parties and baby showers.

Respondent's new access policy meets the first prong of the *Tri County* test in that it limits access solely with respect to the interior of the plant and other working areas. However *Tri County* also requires that an employer's access policy is clearly disseminated to all employees. While the new access policy became effective January 1, 2009 it was not

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effectively disseminated to employees until after May 15, 2009. No posting of the new access policy and no oral communication of the new policy was disseminated to employees at least until May 15, 2009. It was not until May 21, 2009, that RN Cline received an e-mail from Respondent regarding Respondent's new solicitation and distribution policy. While the employer at some point placed the new policy on its intranet, RNs could not access Respondent's intranet from home. Given their busy patient care responsibilities, expecting RN's to access the intranet from work computers and then surf the intranet to find a new access policy is neither realistic nor effective communication of the policy to them. I find that prior to May 21, 2009, Respondent did not fulfill its *Tri County* obligations and that until that point its implementation and enforcement of the access rule violated Section 8(a)(1) of the Act.

6. The Enforcement of the New Access Rules

Complaint paragraph 10(c) alleges that on May 14, 2009, DeBello and two security guards enforced the new access rule selectively and disparately against employees who support the Union or engage in protected-concerted activity.

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Complaint paragraph 10(d) alleges that on May 15, 2009, Respondent's security guards enforced the new access rule selectively and disparately against employees who support the Union or engage in protected-concerted activity.

General Counsel contends that Respondent's security guards were acting as Respondent's agents when they engaged in enforcement of the access rule, created an impression employees' activities were under surveillance, and threatened employees with calling the police and arrest.

It must first be determined if Respondent's security guards acted as its agents in enforcing the new access policy, in engaging in surveillance and in threatening to call police and have RNs arrested for trespass.

The Board has held that an employer may be liable for unfair labor practices committed by security guards acting in their official capacity. *Opryland Hotel,* 323 NLRB 723 fn. 3 (1997); *Bakersfield Memorial Hospital,* 315 NLRB 596 (1994); *Southern Maryland Hospital Center,* 293 NLRB 1209 (1989).

The guards in this case were acting under the direct authority of Respondent's Vice President for Human Resources in carrying out Respondent's access policy on May 14 and May 15, 2009. As such their actions are attributable to Respondent.

Since I have found the new access policy did not meet the *Tri County* test for validity until after May 21, 2009, any enforcement of the rule during this period also violated Section 8(a)(1) of the Act.

Thus, the removal of Cline and Wade from the hospital on May 14 and the removal of Wade from the hospital on May 15, 2009, pursuant to the invalid access policy violated Section 8(a)(1) of the Act as alleged in the Complaint.

7. Impression of Surveillance

Complaint paragraphs 11 and 13 allege that on May 14, and May 15, 2009, Respondent's security guards created the impression that employees' union activities were under surveillance.

In *Promedica Health Systems, Inc.,* 343 NLRB 1351, 1352 (2004), the Board reaffirmed long held Board law that an employer who creates the impression employees' protected/concerted activities are under surveillance violates Section 8(a)(1) of the Act.

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The Board's test for determining if an employer has created an impression of surveillance is:

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. . . whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance [citation omitted]. *U.S. Coachworks, Inc.*, 334 NLRB 955, 958 (2001).

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In this case on May 14, 2009, two security guards were called to the nurses' lounge, a non working area, where RNs Wade and Cline were engaged in union activities on behalf of CNA. The guards stood in the door of the nurses' lounge and remained there after the door was closed. After a period of time the door was opened and the guards were still there and insisted that they leave the premises. RN Wade and RN Cline then left the nurses' lounge.

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On May 15, 2009, RN Cline went to the hospital with Eric Schmidt to retrieve Cline's wallet. Cline was off-duty. As Cline was walking through the south entrance of Saint John's, a security guard yelled, "Stop, Jack." The guard also told him, "No union business." RN Cline responded, "I'm here to get my wallet. I have no intention o[f] doing union business." The security guard yelled to another security guard and told the guard, "Follow Jack up there." During this period, the security guard followed Cline throughout the hospital.

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I find in both instances the guards created the impression or actually engaged in surveillance of employees' union activities in violation of Section 8(a)(1) of the Act as alleged in the Complaint. Clearly, on May 14 Cline and Wade were engaged in union activity and the guards' continued presence immediately outside the nurses' lounge would have led them to reasonably assume their protected activities were under surveillance. It has already been established that Respondent's new no access policy did not meet the *Tri County* test. Thus, there was no legitimate reason for the guards to be present to enforce this policy.

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On May 15, while Cline was not at the hospital to engage in union activity the guard's statement to Cline, "Stop, Jack. No union business," would have led to a reasonable suspicion that Respondent thought Cline was engaged in union activity and following Cline throughout the hospital would have further led to the impression that his protected activities were under surveillance particularly in view of the lack of notice to employees of a new no access policy.

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8. Threats to Call the Police

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Complaint paragraph 12 alleges that on May 14, 2009, Respondent's security guards threatened employees with calling the police and having them arrested for trespassing because they support the Union or engage in protected-concerted activity.

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The Board has held that threats to call police in the context of an invalid no solicitation policy violate Section 8(a)(1) of the Act. *Labor Ready, Inc.*, 327 NLRB 1055, 1057-1058 (1999).

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On May 14, 2009 Security guard "Bert" instructed RNs Wade and Cline her that they could be arrested by the police and charged with trespassing if they did not leave the hospital. As noted above, there was no legitimate reason for the guards to be present to enforce Respondent's new access policy since it did not meet the *Tri County* standard. Similarly, the

guards had no legitimate basis to threaten Wade and Cline with arrest by the police for trespass if they did not leave the hospital. I find that the guards' threat call the police and have Cline and Wade arrested for trespass violated Section 8(a)(1) of the Act as alleged.

5 Conclusions of Law

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

- 1. Respondent has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.
- 3. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:
 - a. Interrogating employees about their union and other protected concerted activities.
 - b. Threatening employees with discipline for engaging in union or other protected concerted activities.
 - c. Threatening employees with calling the police and having them arrested for engaging in union or other protected concerted activities.
 - d. Creating the impression that employees' union activities were under surveillance.
 - e. Discriminatorily maintaining and enforcing a no solicitation rule prohibiting employees from wearing ribbons that stated "Saint John's RNs for Safe Patient Care."
 - f. Promulgating, maintaining and enforcing a rule which limits employees' access to its facility without providing adequate notice of the rule to employees.
- 4. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices addressing the violations found.

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Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.³³

5 ORDER

The Respondent Saint John's Health Center, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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- a. Interrogating its employees about their union and other protected-concerted activities.
- b. Threatening employees with discipline for engaging in union or other protected concerted activities.
 - c. Threatening employees with calling the police and having them arrested for engaging in union or other protected concerted activities.
 - d. Creating the impression that the employees' union activities were under surveillance.
- e. Discriminatorily maintaining and enforcing a no solicitation rule prohibiting employees from wearing ribbons that stated "Saint John's RNs for Safe Patient Care."
 - f. Promulgating, maintaining and enforcing a rule which limits employees' access to its facility without providing adequate notice of the rule to employees.
- g. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action designated to effectuate the policies of the Act:
 - a. Cease discriminatorily giving force and effect to the rule prohibiting employees from wearing ribbons that stated "Saint John's RNs for Safe Patient Care."
- b. Cease giving force and effect to a rule which limits employees' access to its facility without providing adequate notice of the rule to employees.

³³ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

- c. Within 14 days after service by the Region, post at its Los Angeles, California facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 7, 2008.
- e. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., June 16, 2010.

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³⁴ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly:

WE WILL NOT threaten you with discipline for wearing ribbons that state, "Saint John's RNs for Safe Patient Care."

WE WILL NOT ask you questions about your Union support or activities or the Union support and activities of other employees.

WE WILL NOT threaten you with calling the police or with arrest for trespass because you engaged in union or other protected-concerted activities.

WE WILL NOT create the impression that we are spying on your union activities.

WE WILL NOT discriminatorily enforce a rule which prohibits you from wearing ribbons that state, "Saint John's RNs for Safe Patient Care."

WE WILL NOT promulgate, maintain or enforce a rule which limits you access to our facilities without giving you adequate notice of the creation of the rule.

WE WILL rescind our Solicitation and Distribution Policy 830.08 which limits employee access to our facility until such time as adequate notice has been given to all employees of the policy.

		SAINT JOHN'S HEALTH CENTER		
		(Employer)		
Dated	Ву			
		(Representative)	(Title)	_

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Los Angeles, California Regional office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, California 90064-1824 (310) 235-7351, Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC RECORDS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above. The final decision and this notice are available in either English or Spanish.